reference to the written record of evidence which the learned trial judge had expressly found to be unreliable.

In their Lordships' judgment, the arguments put forward by counsel for the shipowners are unanswerable and must prevail. The amount of the deposit could not, for the reasons given by him, be regarded as a proper basis for assessing the amount of the damages recoverable by Chabbra. Similarly evidence of the market value of the goods which the learned trial judge, who saw and heard the witnesses who gave it, found to be unreliable could not justifiably be used to found a fresh assessment of the market value of the salt by the Board.

The burden of proving the market value of the salt on delivery at Chittagong was on Chabbra. In the event, while it is probable that such value exceeded the sums of money expended by Atlas in financing the transaction of sale between IOC and Mumtazzudin, Chabbra failed to adduce any reliable evidence to prove what the amount of that excess was.

For these reasons their Lordships feel obliged to conclude that the amount of damages awarded by the Court of Appeal, although arrived at on a basis which they consider was incorrect in law, is nevertheless the only amount that they can justifiably arrive at on the different legal basis which they have already indicated that they consider to be correct.

In the result the victory which Chabbra have won in relation to the proper basis in law for assessing the amount of the damages recoverable by them turns out to be a fruitless victory which avails them nothing.

The judgment of their Lordships therefore is that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Philip Conway Thomas & Co.; Clyde & Co.*

SINGAPORE REPORTS

NG MUI MUI v. INDIAN OVERSEAS BANK

[C.A. (Wee Chong Jin C.J., Sinnathuray & Chua JJ.) July 17, 1985]

[Singapore – Civil Appeal No. 38 of 1984]

Land Law – Mortgage – Sale of mortgaged property – Whether sale at negligent undervalue.

The appellant was the owner of property known as 61, Marshall Road, Singapore, which she mortgaged to the Chartered Bank as first mortgagees and to the respondents as second mortgagees as security for payment of a judgment debt owing by the judgment debtors, one of whom was the appellant's husband. The respondents in furtherance of their power of sale sold the said property for $300,000. The appellant commenced this action claiming "an inquiry whether the money produced by the sale of the said mortgaged property was a proper and/or fair market price and an account on the basis of a proper and fair market price."

The appellant called in two expert valuers to justify her contention that the property was undervalued. The trial judge found that the appellant had not proved a breach of the duty of care the respondents owed to her and/or that she had suffered any damage thereby. The appellant appealed.

Held: it was for the appellant to prove on a balance of probabilities that the $300,000 obtained by the respondents was not the best price obtainable in the circumstances of this case and at the time in question. This she had failed to do.

Cases referred to:

(1) *Cuckmere Brick Co. Ltd.* v. *Mutual Finance Ltd.* [1971] Ch. 949.
(2) *Davey* v. *Durrant* 26 L.J. Ch. 830.

COURT OF APPEAL.

Helen Yeo for the appellant.
Lee Hock Seng for the respondents.

Cur. Adv. Vult.

Chua J. (delivering the Judgment of the Court): This is an appeal from the judgment of the High Court (Abdul Wahab Ghows J.) dismissing the claim of the appellant who alleged that the respondents had failed to exercise due care in the sale of a property mortgaged by the appellant to the respondents.

At the end of the appellant's case the respondents submitted that there was no case to answer.

Abdul Wahab Ghows J. was not impressed by

the comparative tables produced by two valuers called by the appellants to justify their valuations they gave in relation to the said property. The learned Judge found that the appellant had not proved a breach of the duty of care the respondents owed to her and/or that she had suffered any damage thereby.

The main ground of appeal is that the learned trial Judge erred in law and in fact in failing to find that the respondents had breached their duty of care and that the appellant had suffered damage thereby.

After hearing the appeal we dismissed the appeal and now give our reasons.

The following facts are not in dispute. The appellant was the owner of the property known as No. 61 Marshall Road, Singapore, ("the said property") which she mortgaged to the Chartered Bank as first mortgagees and to the respondents as second mortgagees. The said property was mortgaged to the respondents on November 4, 1978, as security for payment of a judgment debt owing by the appellant's husband, Yeo Kian Peng, Yeo Kian Lip, Yeo Kian Doo, Nah Whee Yang, Heo Hong Lian and Motorcycle Industries (1973) Pte. Ltd., ("the judgment debtors").

In October 1979, the judgment debtors proposed to sell some of the other properties mortgaged to the respondents. The respondents objected to the proposed sale of two properties in Haig Road as the sale prices proposed were below market value. Then on October 15, 1979, the respondents' solicitors, Ramdas & Wong, wrote to Chor Pee & Co., solicitors for the judgment debtors, the relevant portion of which reads:

"Our clients presently have parties interested in the purchase of the following properties, with vacant possession:-

(i) No. 328 Joo Chiat Road, Singapore, for S$450,000.00;

(ii) Land at No. 61 Marshall Road, Singapore, for S$300,000.00.

Their above offer is valid up to 22.10.79 only. Unless your clients can find a better offer, our clients shall proceed to a mortgagees' sale of both of them. A private sale is suggested of both properties in preference to a public auction as it will be obvious to you that bidders at auctions stay below the market value."

Chor Pee & Co. replied on October 18, 1979, stating:

"We have just been instructed by our clients that your clients have agreed to hold on the sale of the properties mentioned in your letter dated October 15, 1979. The reason is that there may be some development on these properties which may raise the value of these properties."

Ramdas & Wong replied on October 22, 1979, the relevant portion of the letter reads:

"As for No. 61 Marshall Road, Singapore, there has been no change in its value, nor have we been advised by you that your clients were able to obtain any offer above the $300,000.00 stated in our letter of 15.10.79. In accordance with that letter, our clients will now proceed to sell the same after that date."

Then on October 23, 1979, the respondents received a letter from Chor Pee & Co., the relevant portion of which reads:

"Our clients welcome all genuine offers to purchase the properties. However, our clients require all properties to be sold to be subject to the existing tenancies. If our clients accept the offers mentioned in your letter of October 15, 1979, our clients would like to know who should be liable for any losses incurred in any of the following events:-

1. If the 'parties interested' withdraw their offers to purchase either No. 328 Joo Chiat Road or No. 61 Marshall Road;

2. If the 'parties interested' reduce their respective offers."

Ramdas & Wong wrote to Chor Pee & Co. on October 24, 1979. As regards the said property they wrote:

"As indicated in our letter of 22.10.79, our clients as Mortgagees, will proceed to sell No. 61, Marshall Road, by private treaty for $300,000.00, in the absence of any better offers made by your clients, or any indication by them that they would prefer our clients' mortgagee's sale to be made by public auction."

By letter dated November 9, 1979, Ramdas & Wong, on behalf of the respondents, formally demanded payment forthwith from the judgment debtors of the entire balance of the moneys outstanding to the respondents.

At about the same time in November 1979, the respondents, in exercise of their power of sale, agreed, subject to contract, to sell the said property to Mr. Abedeen Tyebally for $300,000.00.

On December 4, 1979, Ramdas & Wong wrote to Chor Pee & Co. enclosing for their information photocopies of the draft Agreement for Sale and Purchase of the said property and the letter ended: "Let there be no doubts as to our clients' intent to sell off the said property. . ."

On December 8, 1979, Chor Pee & Co. wrote

to Ramdas & Wong in the following terms:

"re: No. 61 Marshall Road, Singapore

We refer to your letter dated December 4, 1979.

We are instructed by our clients that they object to the sale price of the property as they have a purchaser who is prepared to pay a higher price.

Please note that there is a tenant occupying the premises and the premises fall within the ambit of the Control of Rent Act."

Ramdas & Wong replied on December 11, 1979, stating that the respondents would proceed with the sale of the said property and asking, as a matter of interest, the name and address of the purchaser and the price offered. There was no reply from Chor Pee & Co.

Yeo Kian Doo, the appellant's brother-in-law and one of the judgment debtors, when questioned about the letter of December 8, 1979, admitted in his evidence that what was stated in that letter was not true as at that time he did not have a purchaser who was prepared to pay a higher price for the subject property. He also admitted that he falsely represented to the respondents that the said property was occupied by a protected tenant to frustrate the bank.

The Agreement for Sale and Purchase of the said property was executed on December 12, 1979, and the sale was completed on December 28, 1979.

On December 26, 1979, Ramdas & Wong received a letter from Tan Kay Bin & Co. stating that their clients Abacus Holdings Pte. Ltd. and Motorcycle Industries Pte. Ltd. had secured a buyer for the said property at $305,000.00 and asked for the title deeds.

In March 1980, after the said property had been sold to Tyebally, the appellant purported to enter into an agreement with one Oh Boon How granting the latter the use of the shed standing on the said property. Tyebally then commenced an action for possession which was vigorously resisted by the appellant and Oh Boon How. This action was concluded on June 15, 1981, when Tyebally consented to make an *ex gratia* payment of $15,000 to Oh Boon How upon the latter delivering up vacant possession of the said property.

The appellant commenced this action on July 2, 1980, claiming "an inquiry whether the money produced by the sale of the said mortgaged property was a proper and/or fair market price and an account on the basis of a proper and fair market price" and damages for breach of the terms of the mortgage.

Richard Ellis Pte. Ltd. valued the said property at $410,000.00 as at December 12, 1979, and Jones, Lang, Wootton valued it at $440,000.00.

Willy Shee Ping Yah, a valuer and director of Richard Ellis Pte. Ltd., said that his valuation was based on a sale with vacant possession and by a willing seller. He admitted that a mortgagee sale would fetch a lower price because the vendor had to sell the property fast and there was a psychological stigma and adverse publicity attached to the property. He estimated a forced sale value should be 5% to 10% less than the open market value.

Ho Thian Lam of Jones, Lang, Wootton, however, was of the opinion that a deduction of 10% to 15% should be made for a mortgagee sale. He admitted that a mortgagee should mention in his advertisement that the property was claimed by the mortgagor to be tenanted and rent-controlled. He said that a rent-controlled property would fetch a lower price than a property sold with vacant possession. He added that the amount of compensation payable to a rent-controlled tenant varied according to the circumstances of each case. For valuation purposes such compensation should be deducted from the estimated price with vacant possession.

The expert valuers called by the appellant did not inspire the learned Judge with confidence. The learned Judge was not impressed by the comparative tables produced by Willy Shee and Ho Thian Lam to justify the valuations they gave in relation to the said property. He thought that their adjustments were arbitrary, hence the significantly different percentages they gave for different factors in respect of the same property. It seemed to him that they first estimated what the comparable property should be worth if it was of the same size as the said property and was sold at about the same time, then they adjusted the percentages to justify their estimates. Furthermore the properties cited in their comparative lists were sold with vacant possession.

Appellant's counsel's argument was this:

The learned Judge erred in failing to give sufficient weight to the consideration that valuation practice is not an exact science. Although Willy

Shee and Ho Thian Lam differed in their valuations by 10% such difference was acceptable and not large enough to discredit their evidence. The respondents did not produce an expert to challenge or contradict Willy Shee's and Ho Thian Lam's evidence and in the absence of such evidence the price of $300,000 was an undervalue which in itself was *prima facie* evidence of negligence.

Appellant's counsel submitted that in failing to expose the said property freely in the market to obtain the best price, the respondents had failed to exercise due care. The respondents should explain what steps were taken to obtain the best price or proper price.

So far as mortgages are concerned the law is set out in *Cuckmere Brick Co. Ltd.* v. *Mutual Finance Ltd.*[1] where it was held that a mortgagee, when exercising his power of sale, owed a duty to the mortgagor to take reasonable care to obtain a proper price.

Salmon L.J. in *Cuckmere Brick* said (p. 965):

"It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor."

Further in his judgment Salmon L.J. said (p. 968) after discussing the authorities:

"I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

It was argued that it was for the respondents to justify their acts. We could not accept this argument. The appellant's whole case at the trial was that a fair price had not been obtained because of the respondents' default and negligence. The onus was therefore upon the appellant to establish the default and negligence of which she complained.

It was further urged by counsel for the appellant that the said property ought, before the sale to Tyebally, to have been put up for sale by auction, or at least advertised for sale. We were not prepared to hold that the respondents were not justified in accepting a fair offer for the purchase of the said property until they had first put up the said property for sale by auction. To hold that would be to limit the power given by section 24(1)(a) of the Conveyancing and Law of Property Act (Cap. 268), which expressly authorises a sale by public auction or by private contract. We were of the view that neither were the respondents bound to advertise before proceeding to a sale (*Davey* v. *Durrant*[2]).

The fundamental issue in this action was whether there was or was not a sale of the said property at a negligent undervalue.

The first question is — when the respondents, being fully entitled to sell, sold the said property for $300,000 in November 1979, was the market value of the said property in excess of $300,000 to such an extent that the sale must be considered as one made at an undervalue? The second question — if so was the sale at that undervalue the result of negligence?

The appellant relied on the evidence of two valuers. These witnesses did not afford a reliable guide as to the true market value of the said property in November 1979 as the trial Judge commented.

The respondents instructed Michael Sim & Associates, valuers, to advise on the market value of certain properties including the said property and on September 27, 1979, the valuers reported that the estimated market value of the said property in September 1979 "for the purpose of redemption and with vacant possession was $320,000.

By October 15, 1979, the respondents had an offer of $300,000. The question is what would a reasonable man do in the circumstances. The amount due to the respondents was very large and they held a second mortgage. The respondents would have more reason to be concerned than the first mortgagee over any postponement or delay in the exercise of their power of sale as the accruing interest on the first mortgage would in effect be eroding the security of the second mort-

gage. The appellant and her family were recalcitrant and were determined to frustrate the respondents in their attempt to sell the said property. The respondents were not bound to wait till a more advantageous sale could be effected. The respondents sold to Tyebally with the owner refusing to give possession. It was a sale without possession. In our view the respondents had acted in a reasonable manner.

It was for the appellant to prove on a balance of probabilities that the $300,000 obtained by the respondents was not the best price obtainable in the circumstances of this case and at the time in question. This the appellant had failed to do.

For these reasons we dismissed the appeal.

Appeal dismissed.

Solicitors: *Chor Pee & Co.; Ramdas & Wong.*

CHIN HWA TRADING PTE. LTD. v. UNITED OVERSEAS BANK LTD.

[O.C.J. (Wee Chong Jin C.J.) March 8, 1985]

[Singapore – Originating Summons No. 463 of 1984]

Contract – Auction sale of mortgaged property – Absence of planning approval for subdivision of property by original purchaser – Whether sale agreement tainted with illegality – Planning Act (Cap. 279), ss. 9(3) (a) & (9).

Land Law – Conveyancing practice – Absence of planning approval for subdivision of property by original purchaser – Whether sale agreement tainted with illegality – Meaning of "subdivide" – Planning Act (Cap. 279), ss. 2, 9(3) & (9) – Registration of Deeds Act (Cap. 281) s. 14(1)(c) – Land Titles Act (Cap. 276), s. 144(1).

The plaintiff company (the sub-sub purchaser) was the successful bidder at an auction sale of a property put up for sale on April 18, 1984 by the defendant bank in exercise of its power of sale as mortgagee. This piece of property was one of the lots the original purchaser had subdivided into separate factory units without obtaining any prior permission from the Planning Authorities. On May 23, 1984 the defendants' solicitors served a notice on the plaintiffs' solicitors calling upon them to complete the purchase of the property within 21 days. The plaintiffs' solicitors made an application to court to determine whether the auction sale agreement of April 18, 1984 was "tainted with illegality" because it amounted to an agreement to complete the sale and purchase of property by an illegal act in breach of section 9(3) (a) of the Planning Act. It was contended that the contract was not one that the mortgagee could lawfully perform because in order to perform it the mortgagee had to execute an instrument assigning to the sub-sub purchaser *inter alia* "all the estate right and title to the property" and which instrument sub-divides land within the meaning of the Planning Act.

Held: (1) it must be implicit in the definition of "subdivide" in section 2 of the Planning Act that it is the instrument which becomes capable of being registered or being included in a separate folio of the land register before a person can be said to subdivide land within the meaning of the Planning Act. The reason is because the Registration of Deeds Act and the Land Titles Act provide for the registration of instruments affecting land and not of land;

(2) in the present case the agreement itself was clearly not capable of becoming registered under the Registration of Deeds Act or being included in a separate folio of the land register under the Land Titles Act and accordingly the agreement did not subdivide land within the meaning of the Planning Act and did not infringe the provision of section 9(3) of the Planning Act;

(3) the auction sale agreement was therefore lawful and it was lawful for the parties to the agreement to complete the Sale and Purchase of the property;

(4) costs should be in favour of the mortgagee.

ORIGINATING SUMMONS.

C. C. Tan for the plaintiffs.
R. Quek for the defendants.

Cur. Adv. Vult.

Wee Chong Jin C.J. : The plaintiff company was the successful bidder at an auction sale of a property put up for sale on April 18, 1984 by the defendant Bank in exercise of its power of sale as mortgagee. The property was described in the published Particulars of Sale as follows:

"Property	Lot No.	Mukim	Floor Area	Title"
No. 37, Kallang Pudding Road #01-12 (formerly known as G 12/14) Block B Tong Lee Building Singapore	3142 part	24	approx 282 sq.m.	Freehold

The auction sale was subject to the Singapore Law Society's Conditions of Sale 1981 and the auction Conditions of Sale, of which Conditions of Sale 4 and 5 are material and read as follows:

"4. The purchase shall be completed and the balance of the purchase money shall be paid one month from the